

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HEALTH

In the Matter of Morgan's  
Mexican & Lebanese Foods,  
WIC Vendor No. W6015

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW  
AND RECOMMENDATION**

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick, at 9:30 a.m. on May 20, 1997, in Room LL-54 of the Metro Square Building, 121 East Seventh Place, St. Paul, Minnesota. The record closed at the end of the hearing.

Wendy Willson Legge, Assistant Attorney General, 525 Park Street, Suite 500, St. Paul, Minnesota 55103, appeared on behalf of the Minnesota Department of Health (Department). Roger W. Morgan, President of Morgan's Mexican & Lebanese Foods, Inc., 736 South Robert Street, St. Paul, Minnesota 55107, appeared on behalf of the Appellant.

Notice is hereby given that, pursuant to Minn. Stat. § 14.61 the final decision of the Commissioner of Health shall not be made until this Report has been made available to the parties to the proceeding for at least ten days, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the Commissioner. Exceptions to this Report, if any, shall be filed with Anne Barry, Commissioner of Health, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440.

**STATEMENT OF ISSUE**

Whether Appellant is entitled to renewal of its vendor license in the Special Supplemental Food Program for Women, Infants and Children (WIC program).

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

**FINDINGS OF FACT**

1. Morgan's Mexican & Lebanese Foods, Inc. (Morgan's), operates a grocery store at 736 South Robert Street, St. Paul. The President of Morgan's is Roger Morgan; he took over operation of the business from his parents several years ago. Morgan's has operated at its current location since 1963 and been a WIC vendor since the WIC program began in Minnesota. Several employees assist in the operation of the store, including tagging prices on food items and accounting. Morgan's purchases some of its

WIC allowed foods, such as infant formula, from Cub Foods and Sam's Club, which are warehouse-style retailers.

2. The Retail Food Vendor Guarantee (the Guarantee) is the contract entered between the Department and a vendor to set the terms of participation in the WIC program. Morgan executed its most recent Guarantee on March 26, 1996. Exhibit 11. By its own terms, the Guarantee expired on April 11, 1997. *Id.* at 5. The normal practice for a vendor seeking to remain eligible to accept WIC vouchers as payment for food is to initiate the renewal process prior to the expiration of the Guarantee. The Department provides forms for doing so.

3. As an authorized vendor, Morgan's is required to submit a price survey that identifies how much the vendor charges for WIC allowed foods. The Department determines the average price, plus one standard deviation, of all WIC allowed foods from all vendors in a particular category (e.g. adult cold cereal) and multiplies the result by the minimum number of units of that category required to be stocked. Exhibit 4. The amounts derived are added together to determine the "total package price" that is the maximum that a vendor may charge for the WIC allowed foods that are required to be stocked. Exhibit 8. To account for regional variations in prices, the Department divides the State into three regions, North, Central, and South. Ramsey County is in the Central Region. *Id.* The total package price for the Central Region for January through June, 1997, is \$205.81. *Id.*

4. Morgan's submitted a price survey for October, 1996, which listed its prices on WIC allowed foods. Exhibit 2. The price for infant formula on the price survey was \$3.49 for Similac (13 oz. can) and \$4.15 for Isomil (13 oz. can). *Id.* at 2.

5. In accordance with its standard practice for vendors nearing the expiration of their Guarantees, the Department sent Morgan's an application form, information on the maximum price allowable for WIC allowed foods, and a worksheet to determine if the vendor was in compliance with the price standard. Morgan's filed its application for reauthorization as a WIC vendor with the Department on December 31, 1996. Exhibit 12. The application contained a form for the applicant to list the prices of its WIC approved foods. The Department calculated the total package price for Morgan's, based on the information in the application, as \$229.26. Exhibit 13.

6. On January 6, 1997, the Department sent Morgan's a letter advising it that its prices exceeded the maximum price permissible for WIC allowed foods. Exhibit 12, at 1. The letter is a form letter sent by the Department to advise vendors or vendor applicants when their price surveys show total package prices in excess of the regional limit. Exhibit 14. The letter identifies the approximate percentages that each food category contributes to the total price. Infant formula is listed as contributing 45% to the cost of the food package. *Id.* The Department also sent a worksheet that sets out the calculations to determine whether the prices charged meet the regional limit, instructions for filling out the worksheet, form, the food limits, and vendor eligibility criteria. Exhibits 9 and 15.

7. The Guarantee obligates Morgan's to comply with the WIC policies and procedures set out in federal regulations and state rules and the provisions of the Guarantee. Among the provisions in the Guarantee, the vendor is obligated to:

- F. Charge a total price for the minimum amount of authorized foods in item II A above which is not more than the appropriate price limit published not less than twice per year.

Ex. 11 at 2.

8. Minn. R. 4617.0065, subp. 5, sets out the standard for maximum prices that an eligible vendor is allowed to charge for WIC allowed foods. Vendors become reauthorized under the process established in Minn. R. 4617.0064. Subpart 5 of the reauthorization rule requires the applicant to meet the eligibility requirements in part 4617.0065 to be reauthorized. Subpart 5 also requires the Department to conduct an on-site inspection to verify that the applicant is in compliance with the eligibility standards of Minn. R. 4617.0065.

9. On March 11, 1997, Peter Kuzj, WIC Contract Manager for the Department, conducted the inspection of Morgan's for the purpose of determining vendor eligibility. Kuzj inspected the premises and conducted an inventory of WIC allowed foods for availability and price. He spoke with Morgan and Carolyn Lillo, his assistant. Kuzj noted that there was an insufficient stock of infant juice. Exhibit 18. The price information was analyzed and the total food packet price was determined to be \$227.09. That was still over the maximum price and Kuzj informed Morgan of that fact. Morgan asked if reducing the infant formula price to \$3.29 would put the total food package price within the required maximum. Kuzj responded that it possibly could put the price within the maximum. Lillo lowered the price of Similac to \$3.29 at that time. No one asked Kuzj to recalculate the total food package price based on that one change. No change was made to the price of Isomil at that time.

10. On April 22, 1997, Kuzj conducted an additional inspection of Morgan's. No stocking problems were found. The analysis of prices showed that the store food package price was \$211.84. Exhibit 22. Similac was priced at \$3.29 and Isomil had been reduced to \$3.69. Kuzj informed Morgan that the store was not eligible for reauthorization due to the failure to meet the total food packet price. Morgan again asked what prices had to be changed and offered to make those changes on the spot. Kuzj indicated that the inspection was to verify compliance, not for making further adjustments. Morgan then reduced the price of Isomil to \$3.29 and recomputed the total food package price by following along on the worksheet that Kuzj had filled out. With the further adjustment, the total food package price limitation was not exceeded.

11. On April 24, 1997, Rick Chiat, WIC Vendor Unit Supervisor, sent Morgan's a letter stating that Morgan's would not be reauthorized as a WIC vendor due to noncompliance with the price standard. Exhibit 24. The letter advised that the vendor would not be eligible to reapply for authorization for two years from the date of the

letter. *Id.* The letter stated that there was a 30-day period to appeal the disqualification and request a hearing. *Id.*

12. Morgan's requested an appeal on May 2, 1997. Exhibit 25. The appeal was accompanied by a petition signed by 103 persons supporting the reinstatement of Morgan's as an eligible vendor. *Id.*

13. A Notice of and Order for Hearing in this matter was issued by the Commissioner of Health on May 8, 1997. The Notice set this matter on for hearing on May 20, 1997.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Administrative Law Judge and the Commissioner of the Minnesota Department of Health have jurisdiction in this matter pursuant to Minn. Stat. § 14.50, 7 C.F.R. § 246.18, and Minn. R. 4617.0100, subp. 1. The Notice of Hearing was proper in all respects and the Department has complied with all other substantive and procedural requirements of law or rule.

2. The Applicant has the burden of proof to show that it meets all relevant eligibility standards and it is otherwise appropriate to be reauthorized as a vendor in the WIC program. If the Applicant meets its burden, the Department must demonstrate that some reason exists to deny the requested reauthorization. Facts at issue must be demonstrated by a preponderance of the evidence. Minn. R. 1400.7300, subp. 5; see, also, Minn. R. 4617.0100, subp. 3.

3. Applications for reauthorization are governed by Minn. R. 4617.0064. The provision regarding review of applications states:

The commissioner shall check the application to determine whether the applicant is eligible under part 4617.0065. If an application indicates that an applicant is eligible under part 4617.0065, the commissioner shall do an on-site inspection to verify the applicant's compliance with part 4617.0065. If the on-site visit indicates that the applicant is eligible under part 4617.0065, the commissioner shall approve the application. If the application or an on-site inspection indicates that the applicant is eligible under part 4617.0065, the commissioner shall disapprove the application.

Minn. R. 4617.0064, subp. 5.

4. Minn. R. 4617.0065, subp. 5. provides:

A vendor's total price for the minimum amount of authorized foods in subpart 2 must not be more than the average price plus one standard deviation of other vendors in the same geographic area. The commissioner shall

determine the average price of vendors in the geographic area using shelf price surveys that each vendor shall submit to the commissioner by January 15 and July 15 of each year.

5. The Applicant has not shown that it was in compliance with the eligibility standards of Minn. R. 4617.0065, as of the date of either reauthorization inspection conducted by the Department.

6. The Department has shown by a preponderance of the evidence that Morgan's total food package price was in excess of the maximum price that may be charged for WIC allowed foods in the Central Region.

7. The reauthorization review method followed by the Department to qualify vendors gave Morgan's ample opportunity to comply with the food package price standard. Morgan's had two separate notices that the standard was not being met.

### **RECOMMENDATION**

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Health AFFIRM the denial of the application for reauthorization of Morgan's Mexican & Lebanese Foods, Inc. as an eligible vendor in the WIC program.

Dated this \_\_\_\_ day of June, 1997.

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STEVE M. MIHALCHICK  
Administrative Law Judge

## **NOTICE**

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped, No Transcript Prepared.

## **MEMORANDUM**

Morgan's acknowledges that the total package price of foods was above the maximum allowable for the Central Region. Misunderstanding the calculation method, lacking any specific direction from Department staff to cure the problem, experiencing personal problems, and lacking any bad motive are all reasons given to excuse Morgan's noncompliance with that standard.

The calculation method is detailed in a work sheet that requires no more mathematical skill than addition, multiplication, and division. Exhibit 9. The steps to be followed are clearly stated. Morgan's has been successfully obtaining reauthorization for many years. On the last on-site inspection, Morgan was able to perform the calculations required to determine the total food package price. The impact of the price of infant formula was clearly expressed on the first notice of improper pricing that Morgan received. Exhibit 14. There is no factual basis for determining Morgan's to be eligible due to the vendor's misunderstanding of the process.

When Morgan's sent in its reauthorization application, a price check was performed and the total food package price was found to be in excess of the maximum allowed for Morgan's geographic region. A letter was sent describing the situation and identifying what food categories were above the statewide average. As it turns out, all but the single category of beans, peas, and legumes were above the statewide average. The form letter sent by the Department identifies the problem, expressly indicates that the vendor may wish to make adjustments prior to the reauthorization inspection, and provides the telephone number to contact a WIC vendor liaison. No significant changes were made as a result of the Department's letter and no assistance was requested of the Department by Morgan's

When the first inspection was done, Lillo asked the Department inspector whether reducing the infant formula price to \$3.29 would put Morgan's in compliance. The inspector responded "possibly" (which is the only answer that could be given due the interplay of any other price change on the total food package price). Even with that advice, only the price on Similac was reduced to \$3.29. The price on Isomil was reduced, but only to \$3.69. Even at the hearing on this matter, Morgan showed visible reluctance to reduce the price of all infant formula, since the cost of obtaining the formula from Cub Foods leaves no profit margin, or perhaps requires a loss of a few cents per can. The Judge is sympathetic to the difficulties of operating a small

business, but the WIC program cannot be responsible for two mark-ups on a product. Rather, it must set reasonable prices that it will pay for WIC foods.

Morgan cited the death of his spouse and embezzlement by an employee as other extenuating circumstances to excuse noncompliance with the price standard. The death in the family took place six years ago and the embezzlement took place four years ago. Those events occurred prior to the entry into the Guarantee which Morgan's was seeking to renew with its application. There is nothing in the record to suggest that the reauthorization process was made any more difficult by outside circumstances.

There is no claim that Morgan's was intentionally charging in excess of the maximum allowable price. Morgan's asserts that the lack of bad motive is a reason to excuse the noncompliance. The petition filed with the request for an appeal in this matter is strong evidence of the reputation that Morgan's holds in its community. But, the Department must follow the rules it adopted for administering the WIC program. The Department is obligated to deny reauthorization to any applicant that fails to meet the total food package price standard. Morgan's failed to meet that standard, even after being given notice and time to correct the problem twice. Therefore, the Administrative Law Judge recommends that the denial of Morgan's application be AFFIRMED.

S.M.M.